BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In re: Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie LLC Petition for a Declaratory Ruling	DA-16-1427 WT Docket No. 16-421

COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

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I. EXECUTIVE SUMMARY

The City and County of San Francisco ("San Francisco" of "City") submits these comments on the Public Notice re Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie LLC Petition for a Declaratory Ruling ("Public Notice") issued by the Federal Communications Commission ("Commission" of "FCC") Wireless Telecommunications Bureau ("Bureau").

San Francisco applauds the Commission's efforts to tackle the difficult problem facing wireless carriers and their customers, which is the need for more capacity and better service. These comments explain how San Francisco has worked with telecommunications carriers to enable the deployment of personal wireless service facilities throughout San Francisco, particularly the deployment of Distributed Antenna Systems ("DAS") and other small-cell technology on existing utility and other poles located in the public right-of-way.

Recently, San Francisco has seen an explosion in the number of wireless facilities installed in the public right-of-way. As the Public Notice recognizes, that growth will likely continue as the carriers move forward with their 5G deployment. San Francisco intends to support that growth through an efficient permitting process and by making its own assets available for such use. However, San Francisco believes that such growth should not be at the expense of public health, safety or welfare. Local governments should not be required to allow wireless carriers to install facilities that impair public vistas, detract from scenic and historic resources, or blight neighborhoods. Nor should local governments be required to make municipal assets available for use by wireless carriers. The wireless carriers should fully compensate local governments for using their streetlight and other poles to install and maintain wireless facilities.

In these comments, San Francisco will discuss: (i) how its permitting program for wireless facilities in the public right-of-way is expeditious and requires the carriers to pay only the City's cost-based fees; and (ii) how its new licensing program for such facilities has enabled

carriers to expand their networks at a reasonable cost by allowing them to use City assets. These comments will also show how these programs have enabled San Francisco to protect its historic resources and neighborhoods by regulating the location and appearance of these facilities. San Francisco will also show how all relevant information about its permitting and licensing programs, including the applicable fees, is readily available to the public.

San Francisco also comments on the potential issues that the Commission is considering addressing in a declaratory ruling. San Francisco does not see the need for the Commission to determine on a nationwide basis whether any state or local fees violate 47 U.S.C. section 253(c). Section 253(c) is a safe harbor provision. Its only purpose is to enable a court to decide whether a local regulation that is preempted by 47 U.S.C. section 253(a) would be saved from preemption by section 253(c), because any fees required by the local agency are "fair and reasonable." For that reason, section 253(c) must be considered in conjunction with a particular local requirement. San Francisco is also concerned that the Public Notice seems to confuse regulatory fees, which could be preempted by federal law, and proprietary fees for use of municipal assets, which cannot be preempted. The Commission should make clear that section 253(c) simply does reach local government licensing fees.

There is also no need for the Commission to reconsider its "shot clock" ruling to determine whether the Commission should require a shorter shot clock for DAS and small cells, or a separate shot clock for "batched" applications. While San Francisco has been able to process those applications within 90 days, it has done so only by limiting the number of applications it will begin processing each week. However, these facilities still require significant local review. Many local governments could be hard-pressed to meet shot clock deadlines short than 90 days for collocations and 150 days for new wireless facilities.

Finally, a declaratory ruling addressing public disclosure of local government fees required from telecommunications providers is not necessary. Every state has some sort of freedom of information act that requires state and local governments to disclose this type of information.

II. STATEMENT OF FACTS IN RESPONSE TO THE PUBLIC NOTICE

A. San Francisco Has Permitted Hundreds of Wireless Facilities on Utility Poles in an Expeditious Manner and at Reasonable Cost

In the Telecommunications Act of 1996, Congress focused on zoning regulations as a potential impediment to the deployment of wireless facilities.[1] The state of the art for wireless facilities was to install large base stations on towers or tall buildings to provide coverage over large geographic areas.[2] At that time, wireless carriers had significant coverage gaps, even in major cities. Congress could not have contemplated that some twenty years later coverage would no longer be a major concern, but instead, wireless carriers would need to address capacity issues. Nor could Congress have contemplated that wireless carriers would seek access to the public right-of-way to install and maintain DAS and small cells to increase capacity. In 1996, Congress's concerns about use of the public right-of-way was to eliminate barriers to competition among the incumbent local exchange providers and the new competitive local exchange providers.[3]

This binary system no longer exists. In 2002, the first DAS provider approached San Francisco about installing its facilities on existing utility poles in the public right-of-way. At that time, San Francisco had no specific mechanism in place for approving the use of its public right-of-ways for this purpose.[4]

In 2007, San Francisco enacted S.F. Administrative Code § 11.9, which authorized its Department of Public Works to issue permits to allow telephone corporations[5] to install

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[1] *See* p. 18, *infra*.
[2] San Francisco has issued more than 1,000 permits for wireless facilities on private property. Verizon Wireless alone has been issued 428 permits.
[3] *See* pp. 19, *infra*.
[4] See *NextG Networks of Cal., Inc. v. City and County of San Francisco*, 2006 WL 1529990 (N.D.Cal. June 2, 2006); *GTE Mobilnet of Cal. L.P. v. City and County of San Francisco*, 2007 WL 420089 (N.D. Cal. Feb. 6, 2007).
[5] To be an eligible telephone corporation, an entity could either be certificated by the California Public Utilities Commission to provide telecommunications services in California or be licensed by the FCC to use spectrum in San Francisco to provide wireless services.

wireless facilities on existing utility poles.[6] Section 11.9 also ensured that any permitted wireless facilities would meet San Francisco's aesthetic criteria. In particular, San Francisco was concerned about the installation of wireless facilities in public right-of-ways that are in scenic corridors, in front of parks or historic buildings, and in historic districts. As with all San Francisco permits, members of the public may participate in the permitting process to protest the issuance of the permit or appeal the permit once it was issued.

In 2011, San Francisco improved the permitting process for wireless facilities by repealing Administrative Code § 11.9 and replacing it with Public Works Code Article 25.[7] Like its predecessor, Article 25 authorized the Department of Public Works to issue permits for wireless facilities on utility poles. Article 25 also authorized the Department of Public Works to issue permits for wireless facilities on streetlight poles and transit poles. It also ensured that all permitted wireless facilities would comply with certain aesthetic criteria.

Article 25 does not prohibit the installation of wireless facilities in the public right-of-way in any part of San Francisco. Applicants for wireless permits can apply to install wireless facilities in any zoning district (including residential) and even in sensitive areas such as historic districts and near parks and open space. An applicant for an Article 25 permit does not need to describe the technology it intends to deploy (i.e. DAS or small cell), the intended use of the facility, whether the facility is needed to fill a significant gap in coverage, or whether the applicant explored other means for filing a purported gap in coverage.

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[6] See generally, *NextG Networks of Cal., Inc. v. City and County of San Francisco*, 2008 WL 2563213 (N.D.Cal. June 23, 2008*), on reconsideration*, 2009 WL 5469914 (N.D.Cal. Sept. 25, 2009). In those cases, the district court found that San Francisco's ordinance was not preempted by 47 U.S.C. § 253(a).

[7] Article 25 can be found at http://library.amlegal.com/nxt/gateway.dll/California/publicworks/publicworkscode?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$sync=1.
In *T-Mobile West LLC v. City and County of San Francisco*, 3 Cal.App.5th 334 (2016), *review granted*, 2016 WL 7436414 (December 21, 2016), the California Court of Appeal found that applicable state law granting telephone corporations a franchise right to install and maintain telephone lines in the public right-of-way did not preempt Article 25. The Court found that the state law did not prohibit San Francisco from enforcing its aesthetic concerns when reviewing applications to install wireless facilities on utility poles.

In reviewing an application for an Article 25 permit, San Francisco looks primarily at eight things: (i) the proposed location of the wireless facility; (ii) the type of pole being used (i.e. utility or streetlight pole); (iii) whether the applicant has the pole owner's permission to use the pole; (iv) the size of each piece of equipment to be installed on the pole; (v) the location of each piece of equipment on the pole; (vi) whether the proposed facility meets the applicable "compatibility standard";[8] (vii) whether human exposure to radio frequency emissions from the antenna will comply with the Commission's guidelines; and (viii) whether noise from the proposed facility will comply with San Francisco's noise ordinance.

Under Article 25, an application for a permit to install a wireless facility on a utility pole is submitted online and first reviewed by the Department of Public Works. Public Works has 30 days to determine if the application is complete. Once the application is complete, Public Works will refer the application to the Department of Public Health, to verify that radio frequency emissions from the proposed facility complies with FCC standards and that noise from the proposed facility complies with San Francisco requirements. Public Works will also refer most applications to the Planning Department to determine whether the proposed facility complies with aesthetic requirements. In some instances, the Recreation and Park Department will also review the application.

If all reviewing departments approve the application, Public Works will issue a notice of tentative approval, which is then mailed to local residents and posted near the proposed location of the wireless facility. Absent a protest, Public Works will grant the permit. If local residents file a protest, a hearing will be held. Following the hearing, the Director of Public

[8] This finding depends on the location of the proposed wireless facility. For instance, in a historic district, the Planning Department must determine that the proposed facility would not "significantly degrade the aesthetic attributes that were the basis for the special designation" of the building or district. (S.F. Pub. Work Coe § 1502 [defining Planning Protected Location Compatibility Standard].) For wireless equipment proposed for a view district, the standard is whether the proposed facility "would significantly impair" views. (*Id*.)

Works will issue an order approving or disapproving the proposed facility. If the Director approves the proposed facility, Public Works will issue the permit.[9]

Despite review by many departments, and the potential for a protest and a public hearing, San Francisco's permitting process for wireless facilities on utility poles has been expeditious. The average number of days it took San Francisco to process those applications was 75.[10] San Francisco has also worked with carriers when special circumstances required them to install a large number of new facilities in a short time period.[11]

San Francisco's permitting program for wireless facilities on utility poles has been quite successful. Since 2007, San Francisco has received 966 applications for such permits. San Francisco granted 899 of those applications and denied only 67. As shown below, those denials were often the result of carrier error during the application process:

- Public Works denied 22 applications because the proposed wireless facility was not in public right-of-ways that were in the department's jurisdiction.
- On appeal, the Board of Appeals denied five applications after finding that the applications did not comply with San Francisco's noticing requirements contained in Article 25.
- On appeal, the Board of Appeals denied one application because the applicant did not wait until the one-year prohibition against reapplying for a permit had expired.

Public Works also denied 27 applications because the Planning Department determined that the applications did not meet the applicable compatibility standards and one application because the Recreation and Park Department had determined that the application did not meet the applicable compatibility standard. In each instance, however, the applicant was able to

[9] Exhibit A hereto is a flow chart showing the process for reviewing an application submitted under Article 25. As Exhibit A shows, local residents may appeal a permit. Under the San Francisco Charter, all permits may be appealed. S.F. Charter § 4.106(b). The appeal process can run an additional 40 days or so.

[10] That does not necessarily mean that wireless carriers will immediately deploy. It takes the permittees an average of 210 days to notify San Francisco that installation is complete.

[11] As an example, for the 2016 Super Bowl, for which Verizon Wireless was a major sponsor, Verizon Wireless wanted to make sure that its customers enjoying Super Bowl week festivities in San Francisco had the coverage they needed. To meet that demand, between June 2014 and September 2015 San Francisco granted applications for Verizon Wireless to install 67 facilities on utility poles in the downtown area.

obtain a permit simply by moving the proposed facility to a nearby pole that met the permitting standards.

San Francisco's permitting process for wireless facilities on utility poles has also ensured reasonable costs for the permittees.[12] Permit fees for wireless facilities do not generate revenues that San Francisco can use for other municipal purposes.[13] Nor does San Francisco impose franchise fees or any type of right-of-way use or access fees.[14] San Francisco's wireless permit fees only allow San Francisco to recover its costs for reviewing the permit applications and inspecting the facilities after installation.

B. San Francisco Has a Two-Tiered Permitting Process for Wireless Facilities on Private Property

San Francisco's Planning Code establishes permitting requirements for wireless facilities on private property. In parts of San Francisco that are zoned commercial or industrial, the Planning Code generally requires the applicant to obtain only a building permit to install its facility on private property. The building permit process can be as short as 30 days if the initial application is complete. Within 30 days after receiving an application, the Planning Department will notify the applicant whether the application is complete and, if not, what additional information is needed. At that point, timing is under the applicant's control. The Planning Department will generally complete its review of revisions to the application within ten days. Once a building permit is approved, the applicant may begin construction of the facility.

In parts of San Francisco that are zoned residential or neighborhood-commercial, the Planning Code requires a conditional use authorization ("CUA") to install a wireless facility on private property, in addition to a building permit. The CUA process can take six to nine months

[12] San Francisco's fees are set forth in Article 25. They are as follows: (a) an application fee of $450; (b) when required, a Planning Department fee of $190 plus time and materials; (c) when required, a Recreation and Park Department fee of $125 plus time and materials; (d) a Department of Public Health fee of $181 plus time and materials; and (e) an inspection fee of $150. There is an additional fee if a hearing is required.

[13] *See* pp. 21-22, *infra*.

[14] Like many states, for over 100 years California has prohibited local governments from charging franchise or other fees to telephone corporations for the privilege of using the public right-of-way. See *County of Los Angeles v. Southern Cal. Tel. Co.,* 32 Cal.2d 378, 384 (1948).

depending on how complete an application is when submitted and how long it takes the applicant to respond to the Planning Department's notice that the application is deficient.

Once the Planning Department has determined that the application is complete, which means that all of the Planning Department's concerns have been addressed and all required documents have been submitted, the Planning Department will calendar the matter for a public hearing before the Planning Commission. If the Planning Commission grants the CUA, local residents then have 30 days to appeal the Planning Commission's decision to the Board of Supervisors.[15] Once those 30 days have passed, the applicant may submit an application for a building permit so that construction can begin.

The Planning Department's fees to review applications to install wireless facilities on private property include a base fee for a CUA for a wireless facility of $5,332.00.[16] The Planning Department could also charge the applicant for extra time and materials. Building permit fees are based on construction costs.[17]

San Francisco has permitted 719 wireless facilities on private property. Of those, 283 required a CUA and 436 required only a building permit.

C. San Francisco Has Made More than 26,000 Poles that it Owns in the Public Right-of-Way Available for the Installation of DAS and Small Cells

In addition to the tens of thousands utility poles in San Francisco that are owned by private utility companies, San Francisco owns more than 26,000 poles in the public right-of-way. In the last few years, San Francisco has made a concerted effort to make those poles available for the installation of DAS and small cells.

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[15] It has been many years since the Board of Supervisors upheld an appeal from the Planning Commission's issuance of a CUA for a wireless facility. In the past, a number of wireless carriers sued San Francisco under 47 U.S.C. § 332(c)(7) after the Board of Supervisors upheld such appeals. See, e.g., T-*Mobile West Corp. v. City and County of San Francisco*, 2011 WL 570160 (N.D.Cal. Feb. 14, 2011); *MetroPCS, Inc. v. City and County of San* Francisco, 2006 WL 1699580 (N.D.Cal. June 16, 2006); and *Bay Area Cellular Telephone Co. v. City and County of San Francisco*, 2005 WL 3157490 (N.D.Cal. Nov. 23, 2005). No court ever found that federal law preempted San Francisco's determination.

[16] *See* S.F. Planning Code § 350; http://forms.sfplanning.org/fee_schedule.pdf

[17] *See* S.F. Building Code § 110A; http://sfdbi.org/fees.

The San Francisco Public Utilities Commission ("SFPUC"), San Francisco's water, sewer, and power utility, owns nearly 17,000 streetlight poles throughout San Francisco. These streetlight poles are critical to protecting the public health, safety, and welfare. The San Francisco Municipal Transportation Agency ("SFMTA") manages San Francisco's public transportation system, including electric buses and trolley cars. SFMTA owns over 9,500 poles to support its overhead traction cables that provide power to its electric buses and trolley cars.

In 2015, both the SFPUC and SFMTA agreed to make their poles available for the installation of DAS and small-cell facilities by any certificated or licensed telecommunications carrier. After extensive meetings with the carriers, the SFPUC and SFMTA approved form license agreements to use for this purpose.[18] Once a carrier signed the license agreement with one or both of the agencies, the licensee could choose among the thousands of poles owned by that agency to install their facilities.

In less than two years, the SFPUC has granted licenses to five carriers[19] and issued pole licenses for 364 poles. It is processing an additional 126 applications. The SFMTA has granted licenses to four carriers and issued licenses for 120 poles.[20] It is processing an additional 68 applications. San Francisco's pole licensing program has been so successful that between April 2015 and June 2016 71% of San Francisco's wireless permits were for poles owned by San Francisco and only 29% were for utility poles.

As pole owners, SFPUC and SFMTA made business decisions to make their poles available for wireless facilities. Both agencies saw the benefits to San Franciscans from better wireless services. In addition, with tightening City budgets, they also view these programs as a

[18] Exhibits B and C hereto are the form agreements used by the SFPUC and SFMTA respectively.
[19] The SFPUC has signed licensed agreements with ExteNet Systems, LLC, GTE Mobilnet of California LP dba Verizon Wireless, Mobilitie Investments III, LLC, T-Mobile West, LLC and New Cingular Wireless PCS LLC dba AT&T.
[20] The SFMTA has signed licensed agreements with ExteNet Systems, LLC, GTE Mobilnet of California LP dba Verizon Wireless, Mobilitie Investments III, and New Cingular Wireless PCS LLC dba AT&T.

way to obtain needed revenues to fund their core programs and to further develop and protect these critical municipal assets.[21] Requiring fair compensation for private use of these valuable assets is not only just and reasonable it is required by law.[22]

The SFPUC's and SFMTA's license fees start at $4,000 per pole per year. The SFMTA's per pole rates are reduced for licenses covering more than 50 poles. Both agencies' license fees are subject to annual increases. Both agencies also require cost-based fees for processing the initial license and each application for a pole license.

D. San Francisco's Regulatory and Licensing Requirements for Installation of Wireless Facilities in the Public Right-of-Way Ensure that Wireless Facility Locations and Appearances Are Consistent with Local Standards

Article 25 of the Public Works Code, which allowed telecommunications carriers to install wireless facilities on utility and street light poles, found:

> (1) Surrounded by water on three sides, San Francisco is widely recognized to be one of the world's most beautiful cities. Scenic vistas and views throughout San Francisco of both natural settings and human-made structures contribute to its great beauty.
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> (2) The City's beauty is vital to the City's tourist industry and is an important reason for businesses to locate in the City and for residents to live here. Beautiful views enhance property values and increase the City's tax base. The City's economy, as well as the health and well-being of all who visit, work or live in the City, depends in part on maintaining the City's beauty.

The types of wireless facilities providers install in the public right-of-way can vary considerably in size and appearance. San Francisco does not regulate the technologies used to provide personal wireless services and has no intention to do so. However, San Francisco regulates *the location and appearance* of such facilities in order to prevent providers from installing wireless facilities in the public right-of-way that are incompatible with San Francisco's

[21] Under San Francisco's Charter, the SFMTA and SFPUC must use these revenues only to fund each agency's own programs. *See* S.F. Charter, § 8A.102(b) (SFMTA); and § 8B.121(a) (SFPUC). The SFMTA and SFPUC cannot use their revenues to fund other San Francisco programs.
[22] *See* pp. 23-26, *infra*.

General Plan, which includes an Urban Design Element, and its Better Streets Policy and Better Streets Plan.[23] Article 25 has fulfilled its purpose.

Below are examples of wireless facilities installed on utility poles in San Francisco before San Francisco started imposing its Article 25 design standards:[24]

[23] Among other things, the Urban Design Element of the San Francisco General Plan identifies those parts of San Francisco that merit special protection including view corridors. A copy of the document is available at http://www.sf planning.org/ftp/General_Plan/I5_Urban_Design.htm
The Better Streets Policy requires that any approval for a public or private project in the public right-of-way consider and include the Better Streets design principles. S.F. Admin. Code § 98.1(d). The ordinance specifically calls for reducing visual clutter on the streets. *Id*. § 98.1(d)(5). Following the adoption of the Better Streets Policy, San Francisco adopted its Better Streets Plan, which is available at http://www.sf-planning.org/ftp/BetterStreets/proposals.htm#Final_Plan

[24] The City's authority over the placement of wireless facilities on utility poles is limited by California Public Utilities Commission ("CPUC") General Order 95, which establishes statewide utility pole safety requirements to protect both utility workers and the public. Under General Order 95, the CPUC requires that antennas be mounted at least six feet below or two feet above electrical supply lines (at the top of the pole) and at least two-feet from the center of the pole (when attached below the supply lines). General Order 95, § XI, Rule 94.4 is available at http://www.cpuc.ca.gov/gos/GO95/go_95_rule_94_4.html

This is in contrast with designs approved by the Planning Department pursuant to Article 25:

As shown above, the Planning Department favors designs where: (a) the antennas are at the top of the pole; (b) the equipment boxes are no wider than the pole; (c) the equipment is painted to match the color of the pole; and (d) there is minimal signage. These requirements lead to designs that do not unduly affect local streetscapes, but still allow the carriers to meet their coverage and capacity needs.

E. As the Pole Owner, San Francisco Has More Control Over the Design of the Licensee's Wireless Facility

As previously noted, the SFPUC and SFMTA are licensing poles they own in the public right-of-way to telecommunications carriers installing wireless facilities. The SFPUC's and SFMTA's license agreements require the licensees to obtain approval of all equipment to be installed on their poles. This is important both for safety issues—to make sure the pole can withstand the additional load—and for aesthetic reasons—to make sure the designs are

consistent with community standards. For pole safety issues, both the SFPUC and SFMTA rely on their own engineers. For aesthetic concerns, both agencies rely on the advice of the Planning Department.

As shown below, the Planning Department worked with the carriers to develop a design that would have virtually no aesthetic impact on the surrounding neighborhood while enabling the carriers to provide the coverage and capacity they need.

SFPUC STREET LIGHT POLE

SFMTA TRANSIT POLE

F. The General Public May Readily Obtain Information Concerning San Francisco's Permit Fees and License Fees

As discussed above, San Francisco has two fees related to wireless facilities in the public right-of-way. Permit fees, which apply to all wireless facilities, and license fees, which only apply to wireless facilities installed on City-owned poles. San Francisco also has two permit fees related to wireless facilities on private property: a CUA fee, where a CUA is required, and a building permit fee. These fees are approved in public meetings and are available online.

Similarly, the fees charged to wireless carriers installing their facilities on City-owned poles are adopted publicly and readily available. Those fees are specified in the SFPUC and SFMTA form license agreements that were approved by the governing body for each agency.[25] The Board of Supervisors approved those form agreements in a public meeting. The agendas for the meetings in which those agreements were approved were published on the applicable body's website and included a copy of the agreements. In addition, SFPUC's and SFMTA's agreements with particular carriers are public documents under state and local public records laws, and would be provided to anyone requesting them.[26]

III. SAN FRANCISCO'S COMMENTS ON POTENTIAL ISSUES TO ADDRESS IN A DECLARATORY RULING

A. The Commission Should Not Determine on a Nationwide Basis Whether Any State or Local Fees Violate 47 U.S.C. § 253(c)

1. Congress Did Not Intend Section 253(a) to Preempt Local Laws Regulating the Use of the Public Right-of-Way to Install and Maintain Wireless Facilities. Rather, Wireless Carriers Must Challenge Individual Siting Decisions under 47 U.S.C. Section 332(c)(7)

In the Telecommunications Act of 1996, Congress for the first time opened the door for competitive local exchange carriers ("CLECs") to provide local telephone service in competition

[25] See Exhibits B and C attached hereto.
[26] The California Public Records Act defines the term "public record" very broadly. The definition has three elements: (i) any writing, regardless of physical form or characteristics; (ii) containing information relating to the conduct of the public's business; (iii) prepared, owned, used, or retained by a state or local agency. Cal. Govt. Code § 6252(e). See also S.F. Admin. Code § 67.24(e).

with the incumbent local exchange carriers ("ILECs").[27] Congress intended section 253 to prohibit local regulations that would prevent these new CLECs from competing with the ILECs.[28] To accomplish its purpose, in 47 U.S.C. section 253(a) Congress preempted local "statutes or regulations" that "may prohibit or have the effect of prohibiting" the provision of telecommunications services. Both this Commission and the federal courts generally agree that the pertinent question under section 253(a) is "'whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" [29]

In recent years, as wireless carriers have increasingly moved their facilities into the public right-of-way, a number of courts have been called on to decide whether section 253(a) can preempt a local ordinance that regulates use of the public right-of-way for wireless facilities, rather than seeking relief under 47 U.S.C. section 332(c)(7).[30] Those courts have not squarely answered the question. It is clear, however, that section 253(c) cannot be separated from the required finding that a local regulation has prohibited or effectively prohibited a telecommunications carrier from providing services, a finding that must be made under section 253(a).

Section 253(c) provides in part that "[n]othing in this section affects the authority of a State or local government . . . to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use

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[27] See generally *AT & T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part, dissenting in part); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006).
[28] *See* 47 U.S.C. § 253; *Cablevision of Boston, Inc. v. Public Imp. Comm. of City of Boston*, 184 F.3d 88, 97 (1st Cir. 1999).
[29] *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002) [both quoting *California Payphone Ass'n*, 12 F.C.C.R. 14191 (1997)].
[30] E.g. *See Sprint Telephony PCS, L.P. v. County of San Diego,* 543 F.3d 571, 579 (9th Cir. 2008); *New York SMSA L.P. v. Town of Clarkstown*, 603 F. Supp. 2d 715, 731 (S.D.N.Y. 2009); *Verizon Wireless LLC v. City of Rio Rancho*, 476 F. Supp. 2d 1325, 1335-39 (D.N.M. 2007).

of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." The courts generally agree that a telecommunications provider cannot challenge an ordinance or regulation directly under 253(c). Rather, section 253(c) provides local governments with a safe harbor that could serve to preserve a local law that might otherwise be preempted under § 253(a).[31] If a telecommunications provider establishes that section 253(a) preempts a local ordinance or regulation, then the burden shifts to the local government to establish that the safe harbor provision of section 253(c) applies—that any fees it charges telecommunications providers for access to the public right-of-way are fair, reasonable, and nondiscriminatory under section 253(c).[32]

For this reason, whether a particular fee is fair, reasonable, and nondiscriminatory is not an appropriate issue for this Commission to consider on a "nationwide" basis. A carrier making a preemption claim under section 253(a) in federal court would first have to prove that the local regulatory scheme had barred or effectively barred it from providing telecommunications services. Only then would the court look to whether the regulation and applicable fees were permissible under the safe harbor provisions of section 253(c). For this Commission to interpret section 253(c), without any reference to a preemption claim under section 253(a), simply makes no sense.

Unlike section 253(a), in section 332(c)(7) Congress addressed concerns over the deployment of wireless facilities by individual carriers, which at that time largely occurred on large towers and tall buildings. For that reason, section 332(c)(7)(A) preempts State and local land use *decisions* that violate the express requirements of that section.[33] Section

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[31] *Cablevision of Boston, Inc. v. Public Imp. Comm. of City of Boston*, 184 F.3d 88, 98 (1st Cir. 1999).
[32] *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1272-73 (10th Cir. 2004); *Puerto Rico Tel. Co. v. Municipality of Guayanilla,* 450 F.3d 9, 15 (1st Cir. 2006); and *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76-77 (2d Cir. 2002).
[33] S. Conf. Rep. 104-230, 104TH Cong., 2nd Sess. 1996, 1996 WL 54191, at *208 (Feb. 1. 1996).

332(c)(7)(B)(iii) authorizes the federal courts to scrutinize a local land-use decision over wireless facility siting much more closely than other land-use decisions.[34]

As one court found, Congress intended section 332(c)(7) "to minimize federal interference with State and local land use decisions. . . while still reducing the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers.[35] Section 332(c)(7)(B)(i)(II) allows a court to overturn a local land use decision that would "prohibit or have the effect of prohibiting the provision of personal wireless services." The federal courts have almost uniformly followed the Second Circuit's 1999 decision in *Sprint Spectrum. L.P. v. Willoth*[36] and will look to whether the decision would prevent a carrier "from closing a significant gap in service coverage."[37] [38]

The language of section 332(c)(7) seems to be clear that wireless carriers cannot seek relief under section 253(a), but must file their claims solely under section 332(c)(7):

> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

Despite the "noting in this chapter" language, in its petition Mobilitie clearly takes the position that it could seek to preempt local ordinances that prohibited or effectively prohibited its deployment of small cells under section 253(a), and the Bureau seems to agree.[39] The

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[34] *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 493 (2d Cir. 1999).
[35] *Omnipoint Comms., Inc. v. City of Huntington Beach,* 738 F.3d 192, 194 (9th Cir. 2013) (internal quotation marks and citations omitted).
[36] *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 643-44 (2d Cir.1999).
[37] *T-Mobile Cent., LLC v. Charter Township of West Bloomfield,* 691 F.3d 794, 806 (6th Cir. 2012); *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 48 (1st Cir. 2009); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 733 (9th Cir. 2005); *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 834-35 (7th Cir. 2003); and *APT Pittsburgh L.P. v. Penn Township*, 196 F.3d 469, 480 (3d Cir.1999).
[38] The Fourth Circuit had held that section 332(c)(7)(B)(i)(II) applies only "to blanket prohibitions and general bans or policies, not to individual zoning decisions." *AT & T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 428 (4th Cir. 1998).
[39] *See* Mobilitie, LLC Petition for a Declaratory Ruling*, Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way* ("Mobilitie Petition") at 23-34; Public Notice at 12-14.

reason for that is clear. Mobilitie wants this Commission to make a determination that local governments cannot impose any fees on telecommunications carriers of any kind that are not based on cost recovery. The only authority this Commission would have to address Mobilitie's concern is through a construction of section 253(c), because nothing in section 332(c)(7) directly addresses local government fees. However, neither the Bureau nor Mobilitie have provided a basis for the Commission to somehow find that section 253(a) and, by extension section 253(c), apply to DAS and small cell facilities installed in the public right-of-way.

2. The Meaning of Section 253(c) Cannot Be Separated from the Required Finding that a Local Regulation Has Prohibited or Effectively Prohibited a Telecommunications Carrier from Providing Services

Should the Commission find that section 253(a) somehow applies to wireless facilities that does not mean the Commission should commence a proceeding to determine the meaning of section 253(c). Section 253(c) provides in part that "[n]othing in this section affects the authority of a State or local government . . . to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." The courts generally agree that a telecommunications provider cannot challenge an ordinance or regulation directly under 253(c). Rather, section 253(c) provides local governments with a safe harbor that could serve to preserve a local law that might otherwise be preempted under § 253(a).[40] If a telecommunications provider establishes that section 253(a) preempts a local ordinance or regulation, then the burden shifts to the local government to establish that the safe harbor provision of section 253(c) applies—that any fees it charges telecommunications providers for access to the public right-of-way are fair, reasonable, and nondiscriminatory under section 253(c).[41]

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[40] *Cablevision of Boston, Inc. v. Public Imp. Comm. of City of Boston*, 184 F.3d 88, 98 (1st Cir. 1999).

[41] *Puerto Rico Tel. Co. v. Municipality of Guayanilla,* 450 F.3d 9, 15 (1st Cir. 2006); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76-77 (2d Cir. 2002); and *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1272-73 (10th Cir. 2004)

For this reason, whether a particular fee is fair, reasonable, and nondiscriminatory is not an appropriate issue for this Commission to consider on a "nationwide" basis. Any carrier raising a preemption claim under section 253(a) in federal court could not prevail simply by proving that a fee is unfair, unreasonable, or discriminatory. It would first have to prove that the local regulatory scheme had barred or effectively barred it from providing telecommunications services. Only then would the court look to whether the applicable fees provided the local government with a safe harbor. For this Commission to interpret section 253(c), without any reference to a preemption claim under section 253(a), simply makes no sense.

3. Mobilitie Relies on Anecdotal Evidence to Claim There Is a "Nationwide" Problem, While Ignoring the Difference between Permit Fees and License Fees for use of Government-Owned Property

In its Petition for a Declaratory Ruling, Mobilitie asks the Commission to clarify the meaning of the fees provision of section 253(c).[42] Citing a handful of anecdotal examples, Mobilitie claims that there is a "nationwide" problem of local governments attempting to require Mobilitie to pay "excessive and unfair fees for use rights of way."[43] According to Mobilitie, local governments are requiring them to pay a number of different types of fees, each of which Mobilitie seems to believe violates section 253(c).[44]

There are at least two problems with Mobilitie's arguments. The first is that it is impossible to tell the purpose of each of the fees Mobilitie claims are being required. Whether a fee is reasonable cannot be separated from its purpose. Second, Mobilitie ignores the difference between regulatory fees, which section 253(c) concerns, and proprietary fees, which section 253(c) does not concern. The federal government cannot preempt local governments acting in their proprietary capacity, which is what happens when local governments license use of their poles to wireless carriers.

[42] Mobilitie Petition at 23-33.
[43] Mobilitie Petition at 15-16.
[44] Mobilitie Petition at 16-19.

In section II.A above, San Francisco explains its approval process and fee structure for wireless facilities. The permit fees charged by San Francisco for installing wireless facilities in the public right-of-way are fair, reasonable, and nondiscriminatory, so they would be protected by the section 253(c) safe harbor. The license fees charged by San Francisco for use of its poles are also reasonable—but those fees are not subject to section 253(c)—because San Francisco charges those fees in its proprietary capacity as a pole owner.

a. Under California Law, and the Laws of Many Other States, Permit Fees Charged to Telecommunications Providers Must Be Cost-Based and Not Intended for General Revenue Purposes

Mobilitie challenges as unreasonable and unfair "application fees" that are "typically in the $1,000-$3,000 range [but] can be far higher."[45] But Mobilitie does not explain what these so-called application fees entail. Assuming they are one-time permit fees for access to the public right-of-way, such a fee is not out of line. In San Francisco, a telephone corporation needs to obtain a Utility Conditions Permit ("UCP") in order to construct, operate and maintain its facilities in the public right-of-way. A UCP provides general authorization for the provider to obtain other permits, including permits to install wireless facilities on utility poles. There is a $2,000 fee for a UCP, which must be renewed every two years. This is in contrast with San Francisco's application fees for permits to install wireless facilities on poles. As San Francisco has shown above, these fees are hundreds of dollars per permit.[46] All of these fees enable the City to recover its costs.

These fees are permissible under California law, which requires that permit fees be cost-based and approved by the applicable local governing body. California law prohibits local governments from imposing permit fees in order simply to raise revenues.[47] This is particularly true when it comes to fees charge to telecommunications providers. In 1996, the California Legislature added section 50030 to the California Government Code. Section 50030, entitled

[45] Mobilitie Petition at 16.
[46] *See* pp. 8, fn 13, *infra*.
[47] *See* Cal. Const. art. XIIIA, § 3; *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal.4th 866, 879 (1997).

"California Telecommunications Infrastructure Development Act; permit fee restrictions" provides:

> Any permit fee imposed by a city, including a chartered city, a county, or a city and county, for the placement, installation, repair, or upgrading of telecommunications facilities such as lines, poles, or antennas by a telephone corporation that has obtained all required authorizations to provide telecommunications services from the Public Utilities Commission and the Federal Communications Commission, shall not exceed the reasonable costs of providing the service for which the fee is charged and shall not be levied for general revenue purposes.

As one court held, section 50030 prohibits local governments in California from charging permit fees to telecommunications corporations that are "in excess of the reasonable costs of providing the services" required to review and issue the permit.[48]

California cities, therefore, and cities in many other states, are charging cost-based permit fees to wireless carriers.[49] Every federal circuit court that has considered this issue has found that such cost-based fees are fair and reasonable under section 253(c).[50] Even Mobilitie asks this Commission to find that "'fair and reasonable compensation' means charges that enable a locality to recoup its reasonable costs to review and issue permit and manage its rights of way."[51] Mobilitie simply has not shown that local government permit fees present a problem for the Commission to solve.

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[48] *Williams Comms., LLC v. City of Riverside*, 114 Cal.App.4th 642, 658 (2003).
[49] *See, e.g*. Az. Rev. Stat. § 9-582(B); Colo. Rev. Stat. § 38-5.5-107(1)(b); D.C. Code Ann. § 10-1141.04; Fla. Stat. § 337.401a.1; Ind. Code § 8-1-2-101(b); Kan. Stat. Ann. § 17-1902(N); La. Rev. Stat. Ann. § 48:381.2(F); Minn. Stat. § 237.163(6)(a); N.D. Cent. Code § 49-21-26; Ohio Rev. Code Ann. § 4939.05 (C); Utah Code Ann. § 72-7-102(4); and Wash. Rev. Code § 35.21.860(1).
[50] See *Puerto Rico Tel. Co. v. Municipality of Guayanilla,* 450 F.3d 9, 15 (1st Cir. 2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1272-73 (10th Cir. 2004); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 80 (2d Cir. 2002); and *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000). This is true for the district court cases cited by Mobilitie. *See* Mobilitie Petition at 26-29.
[51] Mobilitie Petition at 24.

b. This Commission Has No Authority to Regulate Local Government Fees for Use of Their Infrastructure by Telecommunications Providers

Mobilitie also asserts that local governments are requiring annual per-pole license fees "for each and every facility Mobilitie constructs."[52] According to Mobilitie, an unnamed Wisconsin city wanted $30,000 per pole, while an unnamed California city first asked for $14,000 per pole but reduced that to $4,000 because that is what a "nearby city had charged."[53] These assertions are ambiguous concerning what these fees represent. It is unlikely that the represent right-of-way use fees, which Mobilitie seems to address elsewhere, as discussed above. The more likely scenario is that they are pole-use fees for poles owned by these unamend cities.

Local governments, like other property owners, may establish fees for use of their property. Local-government regulatory fees for the installation of wireless facilities on utility-owned poles in the public right-of-way may fall under the section 253(c) umbrella, but local-government license fees for occupying space for wireless facilities on poles owned by a local government would not.[54] Because local governments are acting in a proprietary capacity when licensing their poles, federal preemption principles do not apply. The Commission cannot require local governments to allow carriers to use their poles or limit the fees local governments can charge for such use.[55] "In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary

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[52] Mobilitie Petition at 16.
[53] Mobilitie Petition at 16.
[54] The Commission noted the distinction between local governments acting in a regulatory versus proprietary capacities when it considered the applicable time period to approve modifications of wireless facilities under the Spectrum Act. See *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order*, 29 FCC Rcd. 12865, 12964, ¶¶ 237-40 (F.C.C. Oct. 17, 2014).
[55] See *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 418-20 (2d Cir. 2002), citing *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I.*, 507 U.S. 218, 224 (1993); and *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc*., 475 U.S. 282, 286 (1986) ["Not all actions by state or local government entities ... constitute regulation, for such an entity, like a private person, may buy and sell or own and manage property in the marketplace."].

interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction."[56]

This is illustrated in the Public Notice, where the Bureau lauds certain local government programs that require carriers to pay license fees for use of municipally owned poles. According to the Bureau, these programs feature a "relatively low fee structure and streamlined process for review of small wireless facility siting applications.[57] For example, in Baltimore the city's license fee for DAS nodes starts at $2,400 per pole for the first 25 poles and is reduced if the carrier licenses additional poles.[58] In Boston, Verizon Wireless pays the city $2,500 per pole annually,[59] while NextG pays the city five percent of its gross revenues but only $60 per pole per year.[60] Mobilitie has an agreement with New York City in which it pays an annual "zone compensation" of $100,000 per zone with pole license fees of between $38 per month per pole and $332 per month per pole depending on the zone where the pole is located.[61] These fees are all in line with what San Francisco charges for access to its poles.

Mobilitie's Petition does not distinguish these license fees from the types of fees Mobilitie claims run afoul of section 253(c). A right-of-way use fee of $2,500 per pole might not be fair and reasonable, but as the Bureau has noted, a $2,500 per pole license fee enables carriers to proceed with deployment. It is also lawful. As the Bureau seems to agree, local governments have the right to impose license fees for use of their poles that could exceed reasonable regulatory fees.

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[56] *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I*, 507 U.S. 218, 231-32 (1993).
[57] *See* Public Notice at 8, fns. 54-56.
[58] See https://baltimore.legistar.com/LegislationDetail.aspx?ID=2266530&GUID=80896099-02BD-44B0-8416-4F50971742D5&Options=&Search= (DOT 15-0528)
[59] *See* http://www.cityofboston.gov/images_documents/City%20of%20Boston%20&%20Verizon%20DAS%20License%20Agreement_tcm3-53259.pdf
[60] See http://www.cityofboston.gov/images_documents/Copy%20of%20CrownCastle-NextG%20License%20Agreement_tcm3-53260.pdf
[61] See http://www1.nyc.gov/assets/doitt/downloads/pdf/2011_Poletop_Franchise_Agreement_FINAL_Mobilitie_Investments_II_LLC.pdf

c. Any Limits on Local Government Fees Licensing Fees for Government-Owned Infrastructure May Violate Federal and State Constitutions

Any determination by the Commission that section 253(c)'s prohibition on unfair and unreasonable fees applies to license fees local governments require for using government-owned infrastructure for their small cells would likely violate the U.S. Constitution and require local governments in many states to violate their own state constitutions.

There is little doubt here that the Commission cannot, under the guise of preemption, regulate how local government choose to use their property. The Takings Clause to the Fifth Amendment to the United States Constitution provides that "nor shall private property be taken for public use, without just compensation." As the Supreme Court has held, the Takings Clause applies both to government condemnation of private property and regulations that allow for the use of another's property: "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[62] The Supreme Court has also found the Takings Clause applies when the federal government takes property owned by state and local governments:

> [W]hen the Federal Government ... takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned.[63]

Commission action in this regard could also require local governments to violate their own state constitutions.[64] The California Constitution, like the constitutions in many other states, prohibits public entities from making a gift of public funds.[65] The California courts have construed this provision to prohibit leasing publicly-owned property for rates that are below

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[62] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).
[63] *United States v. Carmack*, 329 U.S. 230, 242 (1946).
[64] In 2011, the California Legislature required California's publicly-owned utilities ("POUs") to make their utility poles available for use by telephone and cable television corporations. The Legislature also limited the POUs' fees to the costs incurred for use of the poles. Ca. Pub. Util. Code § 9510, *et seq*.
[65] *See* Cal. Const. art. XVI, § 6; Mich. Const. art. IX § 18; N.D. Const. art. X, § 18; N.Y. Const. art. VIII, § 1; Tex. Const. art. III, § 52; and Wash. Const. art. VII, § 7.

market.[66] Local government contracts that violate this California constitutional principle are void.[67] While the "Supremacy clause controls" when there "is an unavoidable conflict between the Federal and a State Constitution,"[68] this Commission should avoid a construction of section 253(c) that creates such a conflict.[69]

B. The Commission Should Not Reconsider the Presumptive Time Periods for Processing Applications for Permits for Wireless Facilities the Commission Established in the *2009 Declaratory Ruling*

In its *Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, 24 FCC Rcd. 13994 (F.C.C. 2009) (the "2009 Declaratory Ruling"), the Commission determined that there was a rebuttable presumption that a permitting authority had "failed to act" within a "reasonable period of time," as the term is used in 47 U.S.C. § 332(c)(7)(B)(v), if the permitting authority did not finally approve or deny an application for a permit to construct a wireless facility within: (i) 150 days for applications for new wireless facilities; and (ii) 90 days for collocation applications.[70] In its *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd. 12865 (F.C.C. Oct. 17, 2014) (the "*2014 Infrastructure Order*") the Commission applied these presumptive time periods to applications to construct DAS and small cell facilities.[71]

In the Public Notice, the Commission asks whether different time periods should be established for small cells, particularly where applicants submit dozens of applications at one time.[72] There is no basis for the Commission to do so, as discussed below.

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[66] *Allen v. Hussey*, 101 Cal.App.2d 457, 472 (1950).
[67] *Id*.; *County of Alameda v. Ross*, 32 Cal.App.2d 135, 146-47 (1939).
[68] *Reynolds v. Sims*, 377 U.S. 533, 584 (1964).
[69] *Jones v. United States*, 526 U.S. 227, 239 (1999). Furthermore, a court might not give deference to an FCC interpretation of section 253(c) that preempted state constitutional provisions. See *Bell v. Blue Cross and Blue Shield of Oklahoma*, 823 F.3d 1198, 1202-03 (8th Cir. 2016).
[70] *2009 Declaratory Ruling*, 24 FCC Rcd, at 14012, ¶ 45.
[71] *2014 Infrastructure Order*, 29 FCC Rcd at 12973-74, ¶¶ 270-72.
[72] Public Notice at 11-12.

1. California Has Taken the Commission's Ruling a Step Further by Imposing a "Deemed Approved" Remedy for Shot Clock Violations

The Commission should be aware that California has turned the Commission's presumptive time periods into a legal requirement. Under a newly enacted California law, a local government's failure to meet the Commission's shot clock means that the application would be "deemed granted." In the *2009 Declaratory Ruling* and *2014 Infrastructure Order*, the Commission declined to adopt the industry's request that it impose a "deemed granted remedy" for shot-clock violations.[73] In 2015, the California Legislature responded to the industry's request by amending the California Government Code to provide in part that: "(a) A collocation[74] or siting application for a wireless telecommunications facility . . . shall be *deemed approved* if . . . [t]he city or county fails to approve or disapprove the application within a reasonable period of time in accordance with the time periods and procedures established by applicable FCC decisions."[75] Unlike with the Commission's "deemed granted" remedy for an eligible facilities request, California law puts the onus on local governments to seek judicial review of an applicant's claim that its application has been "deemed approved" by operation of the law.[76]

In light of the availability of such state remedies, there is no reason for the Commission to consider strengthening *2009 Declaratory Ruling* and *2014 Infrastructure Order*.

2. Rather than Expanding on the *2009 Declaratory Ruling* and *2014 Infrastructure Order* by Allowing for Additional Time to Review Small Cell Applications Submitted in Batches, the Commission Should Allow Local Governments to Develop Plans for Addressing Batched Applications that Best Suits Local Needs

For three reasons, San Francisco has been able to process most applications to install small cells on utility poles well within the Commission's 150-day shot clock. First, as a reasonably large-sized city, San Francisco has been able to provide the resources necessary to

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[73] *2009 Declaratory Ruling,* 24 FCC Rcd. 14009, ¶ 39; *2014 Infrastructure Order*, 29 FCC Rcd. 12977-78, ¶¶ 281-84.
[74] California law uses the term "collocation" to mean adding wireless facilities to a building or structure where there are existing wireless facilities. Cal. Gov. Code § 65850.6(d).
[75] Cal. Gov. Code § 65964.1. The term "applicable FCC decisions" is defined to include both the *2009 Declaratory Ruling* and *2014 Infrastructure Order*. Cal. Gov. Code § 65964.1(d)(1).
[76] *Compare* 47 C.F.R. §§ 1.40001(c)(4), (5) *with* Cal. Gov. Code § 65964.1(a)(3)(B).

process these types of applications in an expeditious manner. Second, unlike many cities, San Francisco has completely separate laws and processes for reviewing applications to construct wireless facilities in the public right-of-way and applications to construct them on private property. Different City departments also do those reviews. For small cells on utility poles on the public right-of-way, San Francisco requires a permit from its Department of Public Works under its Public Works Code.[77] For large wireless facilities on private property, San Francisco requires a building permit from its Department of Building Inspection, under its Building Code, and, in some locations, a conditional use authorization from its Planning Department, under its Planning Code.[78] Three, as discussed below, San Francisco limits how many applications it will start processing each week.

The Commission should not expedite review for these small cell permits. They still need to be thoroughly reviewed. San Francisco's small cell permit applications are reviewed by its Department of Public Works and Department of Public Health, in all instances, its Planning Department, in most instances, and its Recreation and Parks Department, in some instances. The permit applications require public notice, opportunity to submit a protest, a public hearing if a protest is submitted, and a possible appeal. While these facilities might be small that does not mean that they can't, in some instances, have a substantial impact in a dense, urban setting, particularly one like San Francisco with hundreds of historic buildings and dozens of historic districts. It would be shortsighted and arbitrary for the Commission to find that local governments should be able to approve these facilities any faster than is already required, just because the facilities are small.

In fact, even before the Commission adopted the *2009 Declaratory Ruling* and *2014 Infrastructure Order*, San Francisco was concerned about processing dozens of applications to install wireless facilities on existing utility poles. While San Francisco does not limit the number

[77] *See* § II.A, *infra*.
[78] *See* § ll.B, *infra*.

of such applications that can be submitted at one time, San Francisco has notified all the carriers submitting such applications that San Francisco will not begin processing more than ten applications from any one carrier during any one week.

As shown above, due to this limitation San Francisco has been able to complete its processing of applications for small cells permits on poles in the public right-of-way well within the 150-day required period. San Francisco expects that other local governments have found, or will find, similar ways to meet the shot clock when numerous carriers want to submit dozens of applications at the same time. While the idea of an extended shot clock for batched applications sounds attractive in the abstract, San Francisco does not believe that the Commission could adopt a one-size-fits all approach that works for all cities—large and small. Rather, the Commission should allow local governments to come up with solutions that fit their own needs.

C. State Public Records Act Laws Require Local Governments to Disclose Compensation Agreements with Telecommunications Providers

Mobilitie urges the Commission to require local governments to be transparent about fees they charge to telecommunications providers. While on the one hand Mobilitie claims that it "often is unable to determine what the locality previously charged for access," on the other hand it complains about the burden of obtaining such information through "state and local Freedom of Information act laws and ordinances" due to the "patchwork" nature of those laws.[79]

Mobilitie has not shown that there is any reason for the Commission to take action here. Every state has some sort of freedom of information act, which would require state and local governments to provide this information to Mobilitie and any person filing a proper request.[80] If local governments are refusing to provide records as required by state law, those

[79] Mobilitie Petition at 35.
[80] A state-by-state listing of all public records law is available on the FOIA Advocates web site. *See* http://www.foiadvocates.com/records.html.

laws generally provide some sort of legal remedy. It is not this Commission's function to supersede those laws solely to make it easier for Mobilitie to obtain this information.

IV. CONCLUSION

San Francisco appreciates the opportunity to provide the Commission with relevant information concerning the matters raised in the Public Notice. As discussed above, however, San Francisco does not see the need for the Commission to take any actions with respect the installation of DAS and small cell facilities in the public right-of-way.

Dated: March 8, 2017

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